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IN THE

Supreme Court of the United States

October Term, 1962

No. 67

F. L. SHUTTLESWORTH and CHARLES BILLUPS,

Petitioners,

—v.—

CITY OF BIRMINGHAM.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR PETITIONERS

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Opinions Below

The opinions of the Court of Appeals of Alabama are reported at 134 So. 2d 213 (Shuttlesworth, R. 43) and 134 So. 2d 215 (Billups, R. 67).

Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Shuttlesworth, R. 44; Billups, R. 67).

Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (Shuttlesworth, R. 45; Billups, R. 68). A petition to the Supreme Court of Alabama for Writ of Certiorari was denied on September 25, 1961, and application for rehearing was overruled on November 16, 1961 (Shuttlesworth, R. 46, 51; Billups,

R. 68). The jurisdiction of this Court is invoked pursuant to 28 United States Code, §1257 (3), petitioners having asserted below, and asserting here, the deprivation of his rights, privileges and immunities secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The case also involves the following provisions of the General Code of Birmingham of 1944:

"Section 824. It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

"Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

"Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

Question Presented

Alabama has convicted petitioners of "incit[ing] or aid[ing] or abet[ting] another person to go or remain on the premises of another after being warned . . ." The record showed essentially that petitioner Shuttlesworth "asked for volunteers to participate in the sit-down demonstrations" and that petitioner Billups was present at this request. There was no evidence that either persuaded anyone to violate any law, or that anyone following petitioners' suggestions did violate any law, valid under the Fourteenth Amendment to the United States Constitution. A Birmingham ordinance requires racial segregation in restaurants.

In convicting and sentencing petitioners respectively to 180 and 30 days hard labor, plus fines, has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?

Statement of the Case

Petitioners, Rev. F. L. Shuttlesworth and Rev. Charles Billups, were convicted by the Recorder's Court of the City of Birmingham, Alabama and, upon a trial *de novo*, by an Alabama Circuit Court of a violation of Section 824, General City Code of Birmingham, 1944 (R. 8, 59).[1] The City's complaint alleged that petitioners, in violation of Section 824, "did incite or aid or abet" the violation of another City ordinance, Section 1436, which defines the crime of trespass after warning (R. 2, 53).[2] Petitioner Shuttles-

[1] See page 2, *supra*, for text of ordinance.

[2] See page 2, *supra*, for text of ordinance.

worth was fined $100 and sentenced to 180 days hard labor for the City while lesser penalties, $25 and 30 days, were imposed on Billups (R. 8, 59).

The convictions, appealed to the Alabama Court of Appeals, were affirmed, followed by unsuccessful attempts to secure review by the Supreme Court of Alabama (R. 43-45, 46-51, 66-68, 69).

The City undertook to sustain its burden of proof on the testimony of a single witness who did not personally witness any of the facts to which he testified but which the Circuit Court found sufficient for conviction. The witness, Charles L. Pierce, a Birmingham City detective, testified, over the repeated objections of petitioners' counsel, that he was present at petitioners' trial in Recorder's Court when two of the persons whom petitioners allegedly incited to violate a City ordinance, students James Gober and James Albert Davis, testified concerning the instant charge (R. 20-23).

The testimony Detective Pierce heard, and which forms the sole basis upon which the convictions were sustained, follows:

Gober testified that on March 30, 1960 he went to the home of Rev. Shuttlesworth where several others, including petitioners, were present and discussed sit-in demonstrations by Negro students (R. 27-28). Rev. Shuttlesworth participated in the discussion (R. 28). He then asked for "volunteers" for sit-in demonstrations (R. 29). Gober referred to a "list" but didn't know who had made it (R. 29-30). James Albert Davis testified that petitioner Billups came to Daniel Payne College, where Davis and Gober were students, and took Davis in his car to Shuttlesworth's house (R. 31). When Davis arrived, several persons were there, including Shuttlesworth, his wife, and a number of other

students from the College (R. 31). Rev. Shuttlesworth asked for "volunteers" and he (Davis) "volunteered" to go to Pizitz at 10:30 and take part in a sit-in demonstration (R. 31). Davis testified a list was made, but he, also, did not know who made the list (R. 31). Finally, Davis testified that Rev. Shuttlesworth "told him or made the announcement at that time that he would get them out of jail" (R. 31-32). To this testimony the detective added that he knew it was a fact that Gober and Davis did participate in a sit-in demonstration on March 31, 1960 (R. 33).

Upon the foregoing, petitioners were adjudged guilty of having incited or aided or abetted Gober, Davis, and other students to violate the trespass after warning ordinance (R. 40).

At every opportunity, petitioners urged the Fourteenth Amendment due process claim now before this Court. They first moved to strike the complaint (R. 3), then demurred (R. 4), moved to exclude the testimony (R. 6) and for new trial (R. 11). Again, in assignment of errors in the Court of Appeals (R. 41-42) and petition for certiorari in the Supreme Court of Alabama (R. 47-50) a violation of due process guaranteed by the Fourteenth Amendment to the Federal Constitution was urged.

Petitioners' due process claim is that: 1) Section 824, General Code of Birmingham, as applied to them, deprives them of freedom of assembly and speech; 2) there is no evidence at all that petitioners incited, aided or abetted any violation of law or that a violation of law in fact occurred; and 3) Section 824 as applied is so vague as to constitute a denial of due process of law in violation of the Fourteenth Amendment.

The only court which rendered an opinion was the Alabama Court of Appeals (R. 43-44, 67). It limited review to

considering the sufficiency of the evidence to support a conviction for violation of Section 824. In Rev. Shuttlesworth's case that court found it sufficient that " . . . 'Shuttlesworth asked for volunteers, and that there were some volunteers to take part in sit-down demonstrations' and that Shuttlesworth promised to get them (the students) out of jail" (R. 44). The court then held that, "A sit-down demonstration being a form of trespass after warning, denotes a violation of both state law and especially of Section 1436 of the City Code" (R. 44). Having found that the evidence was sufficient to sustain the conviction on the ground of incitement, the court then ruled that no Fourteenth Amendment free speech rights were involved. It held that petitioners "counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time" (R. 44). The court found the situation here analogous to illegal sit-down strikes in the automobile industry (R. 44).

Rev. Billups' conviction was upheld on the authority of the Shuttlesworth case, except for the following addition: On March 30, 1960 Rev. Billups went to Daniel Payne College in a car where he picked up one of the students, Davis, and drove him to the home of Rev. Shuttlesworth where several people had gathered and where Rev. Billups also was present (R. 67).

ARGUMENT

I.

Fourteenth Amendment Due Process Imperatives Require Reversal of These Convictions.

A. There Is No Evidence in This Record on Which These Convictions May Be Affirmed.

The Alabama courts have held the facts set forth above sufficient to convict petitioners of inciting a violation of an ordinance which provides that, "Any person who . . . goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished. . . . "

Petitioner Shuttlesworth asked for "volunteers" to participate in a sit-in demonstration.[3] But there is no evidence that he incited these volunteers to "remain on the premises of another, after being warned not to do so." Moreover, there is no evidence in this record to sustain a finding that these volunteers did in fact remain on the premises of another after being duly warned not to do so.

Even the Alabama Court of Appeals recognized that there was no evidence to support the charge and so it surmised that petitioners "counseled the college students not merely to ask service in a restaurant, but urged, con-

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[3] See, Pollitt, Duke L. J., *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 315 (1960).

Prior to February 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in 69 cities had ended their discriminatory practices (N. Y. Times, Aug. 11, 1960, p. 14, col. 5). By September 1961, desegregation had occurred in business establishments located in more than 100 cities in fourteen states (The Student Protest Movement: A Recapitulation, Southern Regional Council, Sept. 1961); and since then the number has continued to increase without apparent incident.

vinced and arranged for them to remain on the premises *presumably* for an indefinite period of time" (R. 44). (Emphasis added.)

The Alabama Court then rationalized that, "There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240" (R. 44). This may very well be true, but this record is devoid of any proof of the analogy. There is not a scintilla of evidence in this record that petitioners urged, suggested, or intended the sit-in demonstrators engage in any unlawful conduct. What petitioners in fact urged is simply and plainly not shown by this record. All the record shows as to petitioner Billups is that he drove one of the students to Rev. Shuttlesworth's home and was present during the discussion. For all that the record shows, this petitioner remained silent.

Sit-down demonstrations have taken many forms.[4] And many of these convictions have been reversed as not having been evidence of a crime. See *Garner* v. *Louisiana*, 368 U. S. 157; see *Pollitt, op. cit. supra*, at p. 350 (trespass convictions of students convicted in Raleigh, N. C. dismissed); *King* v. *City of Montgomery*, —— Ala. ——, 128 So. 2d 341 (trespass convictions for sit-in in private hotel reversed); *Briscoe* v. *State of Texas*, 341 S. W. 2d 432; *Rucker* v. *State of Texas*, 341 So. 2d 434; *Tucker* v. *State of Texas*, 341 So. 2d 433; *Johnson* v. *State of Texas*, 341 So. 2d 434 (convictions of sit-ins for unlawful assembly reversed). Moreover, the students who sought service at the lunch counters in the Birmingham cases before this Court for review did not violate any valid ordinance by peacefully seeking such food service since the Birmingham

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[4] *Ibid.*

ordinance requiring racial segregation in restaurants or other places serving food is unconstitutional on its face.[5] *Turner* v. *City of Memphis*, 369 U. S. 350.

The due process criterion applied by this Court in *Garner*, *supra*, and *Thompson* v. *City of Louisville*, 362 U. S. 199, must be invoked here to void these convictions on records barren of evidence.

B. This Record Discloses Only an Exercise of Constitutionally Protected Freedom of Assembly and Speech.

Protest demonstrations against racial discrimination in places of public accommodation in the United States antedate by almost a century the current wave of Negro student "sit-in" or "sit-down" demonstrations which commenced in Greensboro, North Carolina on February 1, 1960.[6]

The more recent Negro student sit-in demonstrations have been viewed from their inception as the exercise of

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[5] " 'Sec. 369. Separation of Races.

It shall be unlawful to conduct a restaurant or other place for serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment' " (1930, §5288).

This ordinance is judicially noticeable by the Alabama courts, Ala. Code Ann. Tit. 7. §429 (1) (1940). See *Shell Oil* v. *Edwards*, 263 Ala. 4, 9, 81 So. 2d 535, 539 (1955); *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710, 711 (1951). " 'The act approved June 18, 1943, requires that all courts of the State take judicial knowledge of the ordinances of the City of Birmingham.' " *Monk* v. *Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. denied 341 U. S. 940. And this Court takes judicial notice of laws which the highest court of a state may notice. *Junction R.R. Co.* v. *Ashland Bank*, 12 Wall. (U. S.) 226, 230; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 778; *Adams* v. *Saenger*, 303 U. S. 59; *Owings* v. *Hull*, 9 Peters (U. S.) 607, 625.

[6] Westin, *"Ride-In,"* American Heritage, Vol. XIII, No. 5, p. 57 (1962).

constitutionally guaranteed free speech under at least some circumstances. *Garner v. Louisiana*, 368 U. S. 157. (Concurring Opinion of Mr. Justice Harlan.) They are, by their inherent and manifest nature, a protest against racial discrimination.[7]

The record here discloses only that these petitioners met with Negro students shortly after these protests began on February 1, 1960 and discussed these demonstrations. The sole witness in this case testified that he heard one of the students testify that " . . . the meeting was in the living room of Reverend Shuttlesworth's house and that Reverend Shuttlesworth participated in the discussion about the sit-down demonstrations" (R. 28). Petitioner Shuttlesworth asked for "volunteers" to participate in a "sit-in" or "sit-down" demonstration. At one point, petitioner Shuttlesworth told one of the students that he would get him out of jail. Beyond this, there is no evidence in this record concerning precisely the activities petitioners are supposed to have counseled and no evidence concerning the "sit-in" or "sit-down" demonstrations themselves which followed this counsel.

The Birmingham city ordinance requiring racial segregation in public restaurants makes clear that the City's policy was one of racial segregation in this area and that the sit-in demonstrations here as in other communities across the South were designed as a protest against this state policy.

The due process clause of the Fourteenth Amendment guarantees the right to make a peaceful protest against state enforced racial segregation. *NAACP* v. *Alabama*, 357 U. S. 449. The evidence in the students' cases before this Court is uncontradicted that the students were at all times

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[7] Note, *Lunch Counter Demonstrations; State Action and the Fourteenth Amendment*, 47 Virginia Law Review 105.

peaceful. At the very least, the constitutional protection extends to a discussion in a private home of sit-ins, especially where it is not demonstrated that any unlawful action was discussed or, in fact, taken.

To sustain these convictions would license Alabama to invade the privacy and freedom of every home where anti-discrimination discussions take place. Mr. Justice Brandeis' admonition in his dissenting opinion in *Gilbert* v. *Minnesota*, 254 U. S. 325, where this Court had upheld, against a similar free speech consideration, a statute proscribing the teaching of pacifism is particularly applicable here. Justice Brandeis warned that the statute there made it a crime "to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do any police officer may summarily arrest them" (at pp. 335-336).

Petitioners here need not claim an absolute immunity from state regulation of their free speech activities, but they claim that their discussions on the night of March 30, 1960, are protected against the punishment which the state here seeks to impose, since there has been no showing that their discussion was " . . . likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. Petitioners are not charged with having conducted a meeting in an unlawful manner, e.g., by sound truck, *Kovacs* v. *Cooper*, 336 U. S. 77 or without a permit where one was required, *Cox* v. *New Hampshire*, 312 U. S. 569, or under circumstances dangerous to public safety, e.g., *Feiner* v. *New York*, 340 U. S. 315,

but cf. *Terminiello* v. *City of Chicago*, 337 U. S. 1, or to have spoken or met in a manner otherwise illegal. Neither have they been punished for crime for having created a clear and present danger of a substantive evil which the state has the power to prevent. Cf. *Schenck* v. *United States*, 249 U. S. 47.

The Court of Appeals of Alabama rested its free speech restriction in this case upon the fact that petitioner Shuttlesworth had promised to get the students out of jail; but, as pointed out above, there is no evidence in this record at all that Shuttlesworth requested any one to perform an unlawful act. Many of the sit-in demonstrators have been arrested and their convictions have been reversed. And, as this Court ruled in the *Garner* case *supra*, such demonstrations are not necessarily a crime.

The convictions of these petitioners under the facts of this case are so clearly repugnant to our common notions of rights protected by the constitutional guarantees of freedom of assembly and speech as to require reversal by this Court.

C. The Ordinance for Violation of Which Petitioners Were Convicted Is Constitutionally Vulnerable on the Grounds of Vagueness.

Petitioners were convicted of inciting students to violate the trespass after warning ordinance of the City of Birmingham. This ordinance, which provides that, "It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the City, or any provision of state law the violation of which is a misdemeanor", is constitutionally vague.

The record here shows that these petitioners did no more than discuss sit-in demonstrations and offer to assist those who volunteered for such demonstrations if they should

become embroiled with the law. The ordinance which convicts them clearly did not give fair warning that to discuss such a sit-in protest is a crime. Indeed, as observed, *supra*, often the demonstrations have resulted in desegregation; when criminal prosecution has ensued, frequently it has failed.

This Court has repeatedly held that a criminal statute or ordinance of this kind must give fair warning to a defendant of what acts are prohibited, *Connally* v. *General Construction Co.*, 269 U. S. 385; and where, as in this case, free speech encroachments are involved, the statute must be even more specific. *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Consequently, where the law has given no notice that lawful free speech may be criminal, these convictions cannot be sustained.

CONCLUSION

For all the foregoing reasons, the petitioners' convictions by the Alabama courts must be reversed.

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